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Task Force Report on Redesign of Form 990

This memorandum addresses two issues raised by the Exempt Organizations Technical Division (CP:E:EO) in comments on the Form 990 Task Force Report regarding the proposed redesign of Form 990.

Issues

1. Whether, by requiring a detailed breakout of unrelated business income and expense information that duplicates or closely resembles information required to be reported on Form 990-T, the draft redesigned Form 990 mandates an unauthorized disclosure of Form 990-T information in violation of I.R.C. § 6103, and/or casts an undue burden on reporting organizations.

2. Whether, the present Form 990 requirement that section 501(c)(3) organizations report the names, addresses and compensation of their most highly compensated five employees and five independent contractors receiving in excess of $30,000 annually, can be expanded to apply to all section 501(c) organizations, taking into account the additional reporting burden and the fact that the information reported becomes public.

Conclusion

So long as information that is required to be reported on Form 990 and which, as a result, is publicly available under I.R.C. § 6104(b) and (e), is limited to information that the Commissioner is authorized to require under I.R.C. § 6033, it is immaterial that the Commissioner also is authorized to require the reporting of the same or similar information under another provision of the Internal Revenue Code (Code), albeit in a form that is broadly protected from public disclosure under the provisions of I.R.C. § 6103.

Moreover, since Congress has granted the Commissioner broad discretionary authority to prescribe the manner in which returns are to be made, under I.R.C. § 6033, the reasonable exercise of that authority by the Commissioner will not be defeated merely because it adds to the reporting burden of affected taxpayers.

Summary of Analysis

Congress plainly has mandated that all information required under section 6033 is to be made public to the extent required under section 6104. Accordingly, the issue at hand boils down to a question of whether or not the Form 990-T or any part of the information reported thereon is information that the IRS is authorized to require under section 6033.

Under section 6033, the IRS has broad discretion regarding the information required to be reported annually by exempt organizations, except that Congress has excluded certain exempt organizations, altogether, from the

requirement of filing annual returns (section 6033(a)(1)(2)(A)); except also that Congress has established certain minimum reporting requirements applicable to certain exempt organizations (section 6033(b)); and except for the caveat that the Commissioner shall only require the reporting of material information reasonably necessary for the administration of the internal revenue laws as they relate to tax exempt organizations.

Thus, in exercising its broad discretionary authority under section 6033, the IRS must stand ready to substantiate the reasonableness and materiality of particular reporting requirements in terms of the reasonable requirements of fair and impartial administration of the tax laws as they apply to exempt organizations, and in light of the apparent purpose and intent of Congress and the reasonable understanding and expectation of reporting tax-exempt organizations.

We appreciate that this result may be subject to challenge considering information reporting by exempt organizations historically (which, the IRS' broad authority notwithstanding, has been guided by statutory dictates from Congress requiring the IRS to exercise that authority) and also considering the disclosure scheme that Congress put in place in 1976 which broadly protects the confidentiality of tax information under I.R.C. § 6103. In particular, we can appreciate that this conclusion reasonably might be expected to be received with some controversy by the exempt organizations community.

Thus, partly by way of explaining the length of this memorandum, and also as an introduction to its substance, we wish to point out that we have endeavored, in our analysis, to anticipate potential objections and possible bases for contesting our conclusion or arguing with the rationale upon which it depends, that affected reporting organizations reasonably might be expected to raise. Accordingly, we have attempted to articulate in advance, based on our extensive research of the history of annual information reporting by exempt organizations, why in our view, such objections if made, would be without merit. In particular, our reasoning and analysis explains that the conclusion we have reached is consistent, fully, with statutory reporting and disclosure provisions imposed by Congress.

Simply stated, we have attempted, exhaustively, to explore the historical development of the law underpinning the rationale upon which our conclusion rests.

To summarize, we have examined the scope of the publicity requirements contained in section 6104 which, today, operate in tandem with the annual reporting requirements authorized under section 6033(a), including those minimum requirements mandated by Congress under section 6033(b). Moreover, we have traced the origin and development of those statutory reporting and disclosure requirements back to their inception, which in the case of section 6104 and section 6033(b) was the Revenue Act of 1950, and in the case of section 6033(a) was the Revenue Act of 1943.

We have endeavored to identify and explain the nature and scope of the broad discretionary authority reposed in the Commissioner with respect to prescribing the information reporting requirements of exempt organizations both before and after Congress expressly recognized the Commissioner's authority in this regard, by statute, with the passage of section 117 of the Revenue Act of 1943. In particular, we have reviewed and extensively discuss Counsel's own prior opinions examining the scope of the Commissioner's discretionary authority to prescribe the information reporting requirements of exempt organizations under section 6033(a).

Likewise, we have researched and analyzed the purpose and operation of the exempt organizations' reform measures passed by Congress in 1950, including the reporting and publicity requirements contained in section 341 of the Revenue Act of 1950. In addition, we have traced the progressive expansion by Congress of those statutory reporting and disclosure provisions through the present time, in order to understand, fully, the intended scope and operation of the current versions of those provisions which now are found in section 6104(b) and section 6033(b).

It is apparent from this survey of the evolution of the current disclosure and reporting scheme applicable to exempt organizations that in periodically enacting statutory reporting and publicity standards Congress did not intend thereby to supplant or displace the broad discretion of the IRS with respect to prescribing such reporting requirements. Congress merely established minimum reporting requirements, leaving it to the discretion of the IRS to prescribe the amount of detail to be required in complying with such minimum standards. Otherwise, Congress has left intact the discretionary authority of the IRS to require the reporting of such information as the IRS deems reasonably necessary for purposes of administering the tax laws relating to exempt organizations.

In particular, a fair reading of the disclosure/reporting scheme put in place by Congress over the years evidences a reaffirmation by Congress of the broad discretionary authority reposed in the IRS with respect to information reporting by exempt organizations subject to such minimum reporting standards as may be set by Congress from time to time (a constraint on the IRS's authority that remains in place today), and subject to a general touchstone standard of "reasonable necessity for purposes of administering the tax laws relating to exempt organizations" the other constraint on the IRS's authority that likewise remains in place today.

Background

In response to concerns expressed by Congress, outside stakeholders and IRS personnel involved in administering the internal revenue laws as they relate to tax exempt organizations, a National Office Task Force was convened to review and recommend improvements to Forms 990, 990-EZ, and Schedule A, that would make these forms a more effective tool for the administration of the internal revenue laws with respect to exempt organizations.

Focusing on IRS compliance needs, but at the same time taking into account the goals of providing useful information to the states and the public, facilitating service center processing, and, so far as practicable, reducing taxpayer burden in the process, the Task Force drafted a proposed redesigned Form 990.

The Task Force submitted a preliminary draft of a new Form 990 to the National Office for consideration and comment. Certain of the National Office's comments were incorporated by the Task Force in its final report dated October 31, 1994. The Task Force's final report, including the proposed redesigned Form 990, then was submitted to Employee Plans/Exempt Organizations' personnel for review and comment. In its response dated December 5, 1994, the Exempt Organizations Technical Division identified the disclosure related issues addressed in this memorandum.

Analysis

1. I.R.C. § 6104

I.R.C. § 6104 and implementing regulations broadly mandate public disclosure of the information that tax-exemptorganizations are required to

report to the IRS, annually. For example, subsection 6104(b), provides, in material part, as follows:

> (b) INSPECTION OF ANNUAL INFORMATION RETURNS.--The information required to be furnished by section[] 6033, ... together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a)) which is required to furnish such information.

Likewise, the provisions of subsection 6104(e) broadly authorize and greatly facilitate public inspection of information reported annually to the IRS by exempt organizations, providing, in material part, as follows:

> (e) PUBLIC INSPECTION OF CERTAIN ANNUAL RETURNS AND APPLICATIONS FOR EXEMPTION.--
>
> (1) ANNUAL RETURNS.--
>
> (A) IN GENERAL.--During the 3-year period beginning on the filing date, a copy of the annual return filed under section 6033 (relating to returns of exempt organizations) by any organization to which this paragraph applies shall be made available by such organization for inspection during regular business hours by any individual at the principal office of the organization and, if such organization regularly maintains 1 or more regional or district offices having 3 or more employees, at such regional or district office.

Thus, section 6104 can be viewed as a "carve-out" from the general requirement that tax information be kept confidential, pursuant to section 6103 of the Code. In fact, the legislative history of the statutory protections now contained in section 6103 confirms that Congress intended section 6104 to operate in this way.

In 1976, Congress amended section 6103 to protect the confidentiality of tax and information returns, as well as any other information received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to such returns, or with respect to the determination of the existence, or possible existence, of liability under the Code, by prohibiting the disclosure of such information except as authorized by Title 26. I.R.C. § 6103(a). See the Tax Reform Act of 1976, § 1202(a)(1), Pub. L. No. 455, 94th Cong., 2d Sess. (1976), 90 Stat. 1525, 1667-1685, 1976-3 C.B. (Vol. 1) 143-161.

Section 6104, dealing with the publicity of information concerning tax exempt organizations, was identified by Congress, specifically, as one such exception to the new confidentiality requirements of section 6103(a). For example, the Senate Finance Committee reported as follows:

> [t]he committee decided it was necessary to allow the disclosure of returns and return information in certain miscellaneous situations. In most of these situations, disclosure is permitted under present law. In each situation, the committee decided that the returns or return information should be public as a matter of policy, or that the reasons for the limited disclosures involved outweighed any possible invasion of the taxpayer's privacy which might result from the disclosure.
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> ...

> [Hence, r]eturns would continue to be open to public inspection in those situations where public disclosure is provided for in present law under section 6104.

S. Rep. No. 938, 94th Cong., 2d Sess. 340 (1976), 1976-3 C.B. (Vol. 3) 378.

The publicity requirements now contained in section 6104, are an expansion of a provision originally enacted, in 1950, as an innovative tax compliance measure. Public disclosure was introduced to promote public oversight of the activities and operations of exempt organizations, thereby supplementing the IRS' own efforts to administer the tax laws relating to exempt organizations, specifically in the context of the unrelated business and investment activities of such organizations.

By 1950, the tax privileged status of exempt organizations engaging in unrelated business activities and associated allegedly abusive tax avoidance transactions had become a highly contentious and increasingly litigated issue. In a letter to Congress dated January 23, 1950, requesting revision of the tax laws, President Truman addressed the problem:

> [T]ax loopholes have also been developed through the abuse of the tax exemption accorded educational and charitable organizations. It has properly been the policy of the Federal Government since the beginning of the income tax to encourage the development of these organizations. That policy should not be changed. But the few glaring abuses of the tax-exemption privilege should be stopped.
>
> Responsible educational leaders share in the concern about the fact that an exemption intended to protect educational activities has been misused in a few instances to gain competitive advantage over private enterprise through the conduct of business and industrial operations entirely unrelated to educational activities.
>
> There are also instances where the exemption accorded charitable trust funds has been used as a cloak for speculative business ventures, and the funds intended for charitable purposes, buttressed by tax exemption, have been used to acquire or retain control over a wide variety of industrial enterprises.
>
> These and other unintended advantages can and should be removed without jeopardizing the basic purposes of those organizations which should be aided by tax exemption.

H.R. Doc. No. 451, 81st Cong., 2d Sess. 5 (1950), Message from the President of the United States Transmitting Request for a Revision of the Tax Laws, January 23, 1950, reprinted in Internal Revenue Acts of the United States 1909-1950, Legislative Histories, Laws, and Administrative Documents (Vol. 116) (B. Reams Jr., ed., William S. Hein & Co., 1979). See also S. Rep. No. 2375, 81st Cong., 2d Sess. 117 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra, (noting the "character of litigation which has developed with respect to certain organizations claiming the benefits of [tax exemption] ... (cf. Roche's Beach, Inc. v. Commissioner, [96 F.2d 776 (2d Cir. 1938)]; Universal Oil Products Co. v. Campbell, [181 F.2d 451 (7th Cir. 1950)]; Willingham v. Home Oil Mill, [181 F.2d 9 (5th Cir. 1950)]; C.F. Mueller Co., 14 T.C. [922 (1950)])."

In response, the Revenue Act of 1950, §§ 301, 321, 331 and 341, Pub. L. No. 814, 81st Cong., 2d Sess. (1950), reprinted in Internal Revenue Acts of

the United States 1909-1950, 47-61 (Vol. 116), supra, contained a four-pronged tax reform initiative that applied to exempt organizations.

First, it introduced an entirely new tax that would be imposed on the unrelated business income of certain otherwise tax exempt organizations (UBIT). See the Revenue Act of 1950, § 301, supra. The new UBIT provisions were inserted in the Internal Revenue Code of 1939 as sections 421 through 424. Such provisions subsequently were redesignated as sections 511 through 515 of the Internal Revenue Code of 1954 (currently, sections 511 through 515 of the Internal Revenue Code of 1986, as amended). The Senate Finance Committee discussed the new UBIT as follows:

> The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of section 101 [now section 501] organizations enables them to use their profits to expand operations, while their competitors can expend only with the profits remaining after taxes. Also, a number of examples have arisen where these organizations have, in effect, used their tax exemption to buy an ordinary business. ....
>
> In neither the House bill nor your committee's bill does this provision deny the exemption where the organizations are carrying on unrelated active business enterprises, nor require that they dispose of such businesses. Both provisions merely impose the same tax on income derived from an unrelated trade or business as is borne by their competitors.

S. Rep. No. 2375, 81st Cong., 2d Sess. 28-29 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra. See also H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra (the UBIT provision "imposes the regular corporate income tax on certain tax-exempt organizations which are in the nature of corporations and the individual income tax on tax-exempt trusts with respect to so much of their income as arises from active business enterprises which are unrelated to the exempt purposes of the organizations.")

Second, Congress amended existing Code provisions relating to the charitable deduction of exempt trusts. The amendment denied a charitable deduction for gifts or bequests in trust where the recipient trust diverted income or corpus from its charitable purposes for the special benefit of the donor or creators of the trust. The amendment also identified a list of "prohibited" transactions which would be deemed to result in a diversion of trust property to non-charitable purposes thereby resulting in a limited or disallowed charitable deduction. See the Revenue Act of 1950, § 321, supra; see also S. Rep. No. 2375, 81st Cong., 2d Sess. 119-122 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

Third, Congress established specific standards under which an organization claiming tax exemption under section 101(6) of the 1939 Code [currently, section 501(c)(3) of the 1986 Code, as amended] must operate in order to maintain exempt status, it clarified the requirements for deductibility of contributions to such organizations, and it identified a list of transactions that were deemed "prohibited" for purposes of maintaining such tax exempt status. See the Revenue Act of 1950, § 331, supra; see also S. Rep. No. 2375, 81st Cong., 2d Sess. 122-125 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

Fourth, the Revenue Act of 1950 contained an unprecedented disclosure provision requiring, for taxable years beginning after December 31, 1949, that certain tax exempt organizations and trusts already subject to the annual

reporting requirements specified in section 54(f) of the 1939 Code [now section 6033(a) of the 1986 Code], shall furnish, in addition to information prescribed by the Commissioner under section 54(f) and implementing regulations, seven specifically itemized categories of financial information annually, which would be available for inspection by the public. See the Revenue Act of 1950, § 341, supra, inserted in the 1939 Code as § 153(a), (b), and (c).[1] See also S. Rep. No. 2375, 81st Cong., 2d Sess. 125-126 (1950), and H.R. Conf. Rep. No. 3124, 81st Cong., 2d Sess. 37 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

Thus, section 341 of the Revenue Act of 1950, added the following new section to the provisions of the 1939 Code:

> SEC. 153. INFORMATION REQUIRED FROM CERTAIN TAX-EXEMPT ORGANIZATIONS AND CERTAIN TRUSTS.
>
> (a) CERTAIN TAX-EXEMPT ORGANIZATIONS.--Every organization described in section 101(6) [of the 1939 Code] which is subject to the requirements of section 54(f) [of the 1939 Code] shall furnish annually information, at such time and in such manner as the Secretary may by regulations prescribe, setting forth-
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> (1) its gross income for the year,
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> (2) its expenses attributable to such income and incurred within the year,
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> (3) its disbursements out of income within the year for the purposes for which it is exempt,
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> (4) its accumulation of income within the year,
>
> (5) its aggregate accumulations of income at the beginning of the year,

[1] The reporting and publicity requirements contained in section 341 of the Revenue Act of 1950, were inserted in the Internal Revenue Code of 1939 as section 153(a), (b), and (c). Such provisions subsequently were redesignated as follows: section 153(a) of the 1939 Code became section 6033(b) of the 1954 Code (currently, section 6033(b) of the 1986 Code, as amended); section 153(b) of the 1939 Code became section 6034(a) and (b) of the 1954 Code (currently, section 6034(a) and (b) of the 1986 Code, as amended); and, section 153(c) of the 1939 Code became section 6104 of the 1954 Code (currently, section 6104(b) of the 1986 Code, as amended).

(6) its disbursements out of principal in the current and prior years for the purposes for which it is exempt, and
(7) a balance sheet showing its assets, liabilities and net worth as of the beginning of such year.

(b) TRUSTS CLAIMING CHARITABLE, ETC., DEDUCTIONS UNDER SECTION 162(a).--Every trust claiming a charitable, etc., deduction under section 162(a) [of the 1939 Code] for the taxable year shall furnish information with respect to such taxable year, at such time and in such manner as the Secretary may by regulations prescribe, setting forth--

(1) the amount of the charitable, etc., deduction taken under section 162(a) within such year (showing separately the amount of such deduction which was paid out and the amount which was permanently set aside for charitable, etc., purposes during such year),
(2) the amount paid out within such year which represents amounts for which charitable, etc., deductions under section 162(a) have been taken in prior years,
(3) the amount for which charitable, etc., deductions have been taken in prior years but which have not been paid out at the beginning of such year,
(4) the amount paid out of principal in the current and prior years for charitable, etc., purposes,
(5) the total income of the trust within such year and the expenses attributable thereto, and
(6) a balance sheet showing the assets, liabilities, and net worth of the trust as of the beginning of such year.

(c) INFORMATION AVAILABLE TO THE PUBLIC.--The information required to be furnished by subsections (a) and (b), together with the names and addresses of such organizations and trust, shall be made available to the public at such times and in such places as the Secretary may prescribe. (Emphasis added).

The Revenue Act of 1950, § 341, Pub. L. No. 814, 81st Cong., 2d Sess. (1950), reprinted in Internal Revenue Acts of the United States 1909-1950, 60-61 (Vol. 116), supra; see also S. Rep. No. 2375, 81st Cong., 2d Sess. 125-126 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

Section 153 of the 1939 Code originated as a compromise proposal offered by the Senate Committee on Finance in response to one limb of the House's four-point reform initiative set forth in H.R. 8920, specifically, the House's proposal to tax the accumulated investment income of certain tax exempt organizations and trusts. As the House Committee on Ways and Means summarized in its Report to accompany H.R. 8920:

> Your committee's bill includes a series of amendments designed to correct certain problems which have arisen in connection with tax exempt organizations. The provisions contained in title III of the bill deal with the unrelated business income of certain tax-exempt institutions, the so-called lease-back problem,[2] the

[2] The House Committee on Ways and Means described "the lease-back problem," as follows:

> As implied by its name, a lease-back involves the purchase of a property by a tax-exempt organization, and the leasing of the property usually to the same business from which the property was purchased. ....

problem of accumulated investment income, and certain restrictions on the exemptions enjoyed by privately controlled trusts and foundations and on the deductions allowed to donors with respect to their gifts to such organizations.

H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra, (emphasis added).

The Senate Committee on Finance, in its Report to accompany H.R. 8920, indicated that the Senate substantially accepted the provisions in the House bill regarding leasebacks and unrelated business operations, and summarized those provisions as follows:

(1) All organizations exempt under section 101(1), and (7), certain organizations exempt under section 101(14), all organizations exempt under section 101(6) except churches or associations of churches, and all trusts receiving charitable

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In many cases the exempt organization, in buying the property, does not use its own funds to make the payment, but borrows the purchase price and pays off this loan plus the interest charges thereon, by applying part or all of the rental income received for a period of years to this purpose. Thus, the exempt organization although investing little or nothing in the venture, obtains after a period of years an unencumbered title to the property.

The purchase and lease-back arrangement apparently is of recent origin. Nevertheless, it has already become big business and a recent writer has characterized it as "the most noteworthy, financial device of the present century." It is reported that one real-estate broker had completed lease-back sales since the war totaling $40,000,000 and had authorizations from approximately 40 institutions for the purchase of an additional $100,000,000 worth of property under this arrangement.

H.R. Rep. No. 2319, 81st Cong., 2d Sess. 38 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

deductions under section 162(a), are subject to income tax or denied charitable deductions with respect to income derived--

(a) from operation of a business enterprise which is unrelated to the purpose for which such organization received an exemption, or

(b) from rentals from property leased to others on a long-term basis where the property was purchased with borrowed funds; [and]

...

(3) "Feeder" organizations ... whose primary activities are concerned with the operation of a business and turning the income earned over to organizations exempt under section 101 are denied exemption under section 101 ....

S. Rep. No. 2375, 81st Cong., 2d Sess. 26 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra (emphasis added).

The Senate Committee on Finance further indicated that it accepted, with modifications, the provisions of the House bill relating to the denial of tax exemption or charitable deductions where certain organizations engage in certain types of transactions with donors. Id. at 27. In addition, the Senate Committee proposed, in "substitution for a House measure providing a tax on the accumulation of investment income (in excess of stated allowances) of foundations, trusts, and certain other educational and charitable organizations," a provision requiring "that information, relating to accumulations and other items, ... will be made available to the public." Id. (Emphasis added). The Senate's substitute proposal became section 153 of the 1939 Code and was summarized by the Senate Committee on Finance as follows:

The filing of annual information showing such items as income, disbursements for charitable, etc., purposes, and accumulations will be required in the case of foundations, trusts, and certain other educational and charitable organizations exempt under section 101(6) and trusts claiming deductions under section 162(a), and this information will be made available to the public.

Id. at 27, 26 (emphasis added).

Thus, Congress' intent in enacting section 153 of the 1939 Code was to redress a particular perceived abuse of tax exempt status, whereby certain exempt organizations would invest and reinvest their income and accumulated investment earnings rather than disburse such resources in furtherance of their tax exempt purposes. The form of redress settled upon by Congress was not a tax on the accumulated investment income of such organizations (as the original House bill had proposed), rather, Congress sought to discourage the practice by imposing the public reporting and disclosure requirements specified in section 153 of the 1939 Code.

Accordingly, section 153 did not originate as a measure to overhaul and reform existing reporting and disclosure requirements applicable to those categories of exempt organizations that would become subject to the provisions of section 153.[3] Rather, section 153 was designed by Congress as a compliance tool that was intended to deter excessive accumulations of investment earnings

[3] The then existing reporting and disclosure provisions applicable to tax exempt organizations are described, fully, at pp.17-19, infra.

by certain types of tax exempt organizations, and at the same time, to encourage more vigorous pursuit by such organizations of their exempt purposes.

Nevertheless, the provisions of section 153 overlapped the existing reporting and disclosure provisions applicable to exempt organizations.[4] As discussed in detail, infra, prior to the enactment of section 153 there was no statutory provision delineating the scope of the Commissioner's authority (recognized in section 54(f) of the 1939 Code) with respect to the annual information reporting requirements of exempt organizations.[5] See pp.17-18, infra. However, in adding the provisions of section 153(a) to the 1939 Code, Congress expressly identified seven, separate categories of information [currently ten separate categories as specified in section 6033(b) of the 1986 Code], that the Commissioner must require section 101(6) organizations [currently, section 501(c)(3) organizations] to report annually.

Previously, the Commissioner had been free to exercise his authority as broadly or as narrowly as he deemed appropriate in establishing the annual

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[4] As discussed, infra, prior to the enactment of section 153 the disclosure of exempt organization information returns was governed by section 55 of the 1939 Code which, although it provided that all such returns "shall constitute public records," nevertheless mandated that as a general matter such returns "shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President." The net effect, therefore, of the disclosure provisions applicable to exempt organizations prior to the enactment of section 153 was that there were no publicity requirements for exempt organization information returns. See pp.19-20, infra.

[5] In 1943, Congress had granted express statutory recognition to the Commissioner's broad discretionary authority to require annual information reporting by exempt organizations, with the passage of section 54(f) of the 1939 Code. Likewise, prior to the passage of such legislation in 1943, the regulations evidenced the broad discretion of the Commissioner to require the filing of such returns furnishing such information as the Commissioner "deemed advisable in the interest of an efficient administration of the internal revenue laws." 26 C.F.R. § 29.101-1 (1944) (containing codifications for the period June 2, 1938 through June 1, 1943). See pp.17-18, infra.

reporting requirements of all reporting exempt organizations. However, after the passage of section 153(a), the Commissioner was no longer free to require the reporting of less information annually by section 101(6) organizations than the bare minimum specified by Congress, under section 153(a), as necessary for the purpose of keeping the public and the IRS apprised of the annual investment income accumulations and associated information of such organizations, as compared with the annual exempt purpose activities conducted and reported by those same organizations.

Thus, Congress did not design section 153(a) as an exhaustive or exclusive list of the categories of information that the Commissioner was authorized to require section 101(6) organizations to report annually. Rather, Congress identified a minimum framework of information that the Commissioner was to require annually from section 101(6) organizations specifically for the purpose of combating the problem of excessive investment income accumulations and minimal exempt purpose outlays by such organizations.

Accordingly, after the passage of section 153, the Commissioner remained free to require section 101(6) organizations to report items of information in addition to those specified in section 153(a).[6] In addition, the Commissioner was authorized to spell out the amount of detail required of section 101(6) organizations in furnishing information addressing each of the seven categories of information specified in section 153(a).

Indeed, as discussed more fully, infra, after the passage of section 153(a), the regulations addressing the annual information reporting requirements of exempt organizations were amended to clarify and confirm that the annual reporting requirements established in 1943, pursuant to section 54(f) of the 1939 Code and implementing regulations, remained applicable to all reporting exempt organizations, and that, henceforth, in addition, section 101(6) organizations would be required to comply with the requirements of new and amended regulations implementing the provisions of section 153(a). See pp.20-22, infra.

In sum, therefore, section 153(a) established minimum reporting requirements applicable to one particular type of exempt organization, those exempt under section 101(6) [now section 501(c)(3)] of the Code. Section 153(b) did likewise, with respect to trusts claiming charitable deductions under section 162(a) of the 1939 Code. See I.R.C. of 1939 § 153(a) and implementing regulations at 26 C.F.R. § 29.101-2(e) and § 29.153-1 (1952) as amended and provided by T.D. 5838, 16 F.R. 3478-79, Apr. 21, 1951. Section 153(c) further established that information furnished in response to the minimum reporting requirements provided for in section 153 would be made available to the public. See I.R.C. of 1939 § 153(c) and implementing regulations at 26 C.F.R. § 29.153-3 (1951) as provided by T.D. 5838, 16 F.R. 3479, Apr. 21, 1951.

Thus, in 1950, with the addition of section 153 to the provisions of the 1939 Code, the current annual information reporting scheme applicable to exempt organizations was put in place.[7]

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[6] As noted, infra, to the extent that it might be argued that section 153(a) actually established an exhaustive list of items that the Commissioner was authorized to require section 101(6) [now section 501(c)(3)] organizations to report annually, such list, as expanded by Congress in 1987, expressly authorizes the Commissioner to require section 501(c)(3) organizations to report any such additional information as the Commissioner may reasonably require "for purposes of carrying out the internal revenue laws." I.R.C. § 6033(b)(10). See also pp.38-39, infra.

[7] The current annual information reporting scheme that was put in place

with the enactment of section 153 of the 1939 Code was summarized by Congress in 1987 in the context of mandating, by means of a statutory amendment to section 6033(b) (formerly section 153(a) of the 1939 Code), that the Commissioner require additional information to be reported on the annual returns filed by section 501(c)(3) organizations:

> Present Law
>
> Except for churches and certain other organizations, any tax-exempt organization must file an annual return with the IRS, setting forth the organizations items of gross income, receipts, and disbursements, plus certain other information related to the administration of the tax law.
>
> A tax-exempt charitable organization, described in section 501(c)(3) must also provide certain additional information ....

H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. (1987), 1987-3 C.B. 296; see also pp.23-24, 38-39, 40, infra.

As a general matter, pursuant to section 54(f) of the 1939 Code [now section 6033(a) of the 1986 Code] and implementing regulations, the Commissioner was authorized to require all exempt organizations (with certain exceptions) to report such information annually as the Commissioner may prescribe by form or regulation for purposes of administering the internal revenue laws relating to such organizations.

In addition, pursuant to section 153(a) of the 1939 Code [now section 6033(b) of the 1986 Code] and implementing regulations, Congress specified certain particular items of information that the Commissioner must require section 101(6) organizations [now section 501(c)(3) organizations] to report annually, albeit "at such time and in such manner" as the Commissioner may prescribe by form or regulation. See section 54(f) of the 1939 Code and implementing regulations, 26 C.F.R. § 29.101-2(e) (1945) as provided by T.D. 5381, 9 F.R. 7123, June 26, 1944; section 153(a) of the 1939 Code and implementing regulations, 26 C.F.R. § 29.101-2(e) (1952) as amended by T.D. 5838, 16 F.R. 3479, Apr. 21, 1951; and, subsections 6033(a) and (b) of the 1986 Code and implementing regulations, Treas. Reg. § 1.6033-2. See also, pp.23-24, 38-39, 40, infra.

With respect to the minimum reporting requirements established under section 153 of the 1939 Code, the Senate Finance Committee stated, as follows:

> It is left to administrative discretion as to whether this new information is to be returned on a separate form prescribed for this purpose or on an information return form now in use, revised to include the new information. The degree of detail and particularity which may be called for in reporting the required information will be determined by regulations.

S. Rep. No. 2375, 81st Cong., 2d Sess. 126 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

The IRS opted to require the reporting of this new public information on an information return form already in use (Form 990), revised to include the new information. The revised form was designated Form 990-A and, for accounting periods beginning after December 31, 1949, all exempt organizations that were subject to the new section 153 reporting and disclosure requirements were required to file Form 990-A in lieu of Form 990. The regular Form 990 continued to be used by reporting exempt organizations that were not subject to the specific minimum reporting and disclosure requirements of Code section 153. See 26 C.F.R. § 29.101-2(e) (1952) as amended by T.D. 5838, 16 F.R. 3479, Apr. 21, 1951; see also pp.20-22, infra.

In addition to filing an information return annually, exempt organizations engaged in unrelated business activities were required to file a separate, new tax form designated as Form 990-T, to report and pay UBIT incurred with respect to such unrelated business operations. See 26 C.F.R. § 29.421-5(b) (1953) as provided by T.D. 5928, 17 F.R. 7967-68, Sept. 3, 1952, implementing the UBIT provisions contained in the Revenue Act of 1950, and inserted in the Internal Revenue Code of 1939 as sections 421 through 424. See also p.8, supra.

The original express statutory requirement that exempt organizations file annual information returns was contained in section 117 of the Revenue Act of 1943, which amended section 54 of the 1939 Code by adding the following new subsection (f), thereto:

> Every organization, except as hereinafter provided, exempt from taxation under section 101 [now section 501], shall file an annual information return, which shall contain or be verified by a

> written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

The Revenue Act of 1943, § 117, Pub. L. No. 235, 78th Cong., 2d Sess. (1943) reprinted in Internal Revenue Acts of the United States 1909-1950, 17-18 (Vol. 88), supra, codified as 26 U.S.C. § 54(f) (1939), and subsequently, as 26 U.S.C. § 6033(a) (1954) (currently I.R.C. § 6033(a) (1986)) (emphasis added).

In approving this 1943 amendment to the Code, the House Ways and Means Committee expressly stated as follows:

> The insertion of this subsection, as well as the exclusion of [certain] organizations from the operation of the subsection, so far as it relates to the filing of annual returns, does not impair the powers the Commissioner now exercises or otherwise has with respect to requiring such returns, by duly prescribed and approved regulations.

H.R. Rep. No. 627, 78th Cong., 1st Sess. 47 (1943), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 110), supra. See also 26 C.F.R. § 29.54-1 (1945) as amended by T.D. 5381, 9 F.R. 7123, June 26, 1944 ("the provisions of section 54(f) relieving certain [tax exempt organizations] from filing annual returns do not abridge or impair in any way the powers and authority of the Commissioner provided for in other provisions of the Internal Revenue Code to require the filing of such returns by such organizations") (emphasis added).

With the enactment of subsection 54(f) of the 1939 Code in 1943, the Commissioner was granted express statutory authority to require exempt organizations to file annual information returns. Nevertheless, in the absence of the express statutory authorization bestowed upon the Commissioner in 1943 with the enactment of subsection 54(f) of the 1939 Code, regulations already in effect prior to that enactment had required the filing of Form 990 annual returns in certain instances, and further provided, as follows:

> In addition to the information specified [in these regulations] the Commissioner may require any additional information deemed necessary for a proper determination of whether a particular organization is exempt under section 101, and when deemed advisable in the interest of an efficient administration of the internal revenue laws he may in the cases of particular types of organizations provide additional questionnaires or otherwise prescribe the form in which the proof of exemption shall be furnished.
>
> ...
>
> Collectors will keep a list of all organizations held to be exempt from tax to the end that they may occasionally inquire into their status and ascertain whether or not they are observing the conditions upon which their exemption is predicated.

26 C.F.R. § 29.101-1 (1944) (containing codifications for the period June 2, 1938 through June 1, 1943).

Such regulations were amended in light of the passage of subsection 54(f), to provide as follows:

> For accounting periods beginning after December 31, 1942, every organization [subject to the requirements of section 54(f)], shall file annually ... a return of information on Form 990 (Revised May 1944) specifically stating the items of gross income, receipts, and disbursements and such other information as may be prescribed by the Commissioner in the instructions on the form or issued by him therewith.

26 C.F.R. § 29.101-2(e) (1945) as provided by T.D. 5381, 9 F.R. 7123, June 26, 1944 (emphasis added).

Neither the Form 990 annual information returns filed pursuant to regulation prior to the enactment of subsection 54(f), nor Forms 990 (Revised May 1944) filed pursuant to regulations implementing the mandate contained in subsection 54(f), were available to the public. The publicity of tax returns, generally, was governed by the provisions of section 55 of the 1939 Code, which provided in material part, as follows:

> SEC. 55. PUBLICITY OF RETURNS.
>
> (a) Public Record and Inspection.--
>
> (1) Returns made under this chapter ... shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

Corporation Tax Provisions of the Internal Revenue Code of 1939, § 55, reprinted in Internal Revenue Acts of the United States 1909-1950, 41-42 (Vol. 110), supra.

The provisions of section 55 of the 1939 Code continued to preclude public inspection of Forms 990 even after the passage of the tax exemption reform measures contained in the Revenue Act of 1950, with the exception of information expressly required to be made available to the public pursuant to the provisions of section 341 of the Revenue Act of 1950, enacted as section 153(c) of the 1939 Code.

Exempt organizations subject to the reporting requirements of section 153(a), were required by regulation to file a return of information on Form 990-A (a revised version of Form 990), pages 3 and 4 of which were designed to accommodate the specific reporting requirements of section 153(a). In pertinent part, the regulations as amended by T.D. 5861 (Apr. 21, 1951) in light of the enactment of section 153 of the 1939 Code, provided as follows:

> § 29.54-1 Records and income tax forms.
>
> Every organization exempt from tax under section 101 but required by section 54(f) to file an annual return shall keep such permanent books of account or records, including inventories, as are sufficient to show specifically the items of gross income, receipts, and disbursements, and such other information as is required by § 29.101-2. ....

.... For further regulations regarding ... filing of returns, and keeping of records by organizations exempt from tax, see § 29.101-1, 29.101-2 and 29.153-1.

§ 29.101-2 Proof of Exemption on or after January 1, 1943; annual returns for accounting periods beginning on or after January 1, 1943.

...

(e) REQUIREMENT OF ANNUAL RETURNS.

For accounting periods beginning after December 31, 1942 and before January 1, 1950, every organization exempt from tax under section 101, regardless of the amount or source of its income or receipts and irrespective of whether it is chartered by, or affiliated or associated with, any central, parent, or other organization, except organizations specifically exempted from filing annual returns by section 54(f) (see paragraph (h) of this section), shall file annually ... a return of information on Form 990 specifically stating the items of gross income, receipts, and disbursements and such other information as may be prescribed by the Commissioner in the instruction on the form or issued by him therewith. For accounting periods beginning after December 31, 1949, the same requirements are applicable with respect to all of the above-mentioned organizations [i.e., every organization exempt from tax under section 101, except organizations specifically exempted from filing annual returns by section 54(f) of the 1939 Code] except that those organizations which are exempt from tax under section 101(6) shall, in lieu of using Form 990, file an information return on Form 990-A to comply with the requirements of this section and of § 29.153-1. (Emphasis added).

§ 29.153-1 INFORMATION REQUIRED FROM CERTAIN TAX-EXEMPT ORGANIZATIONS.

(a) For accounting periods beginning after December 31, 1949, every organization described in 101(6), except organizations specifically exempted from filing annual returns by section 54(f) (see § 29.101-2(h)), shall file a return of information on Form 990-A. ....

(b) Pages 3 and 4 of the return shall set forth the name and address of the organization, and the following information concerning the organization in such detail as may be prescribed by the Commissioner in the instructions on the form or issued by him therewith:

(1) Its gross income for the year in sufficient detail to show the different categories of income,
(2) Its expenses attributable to such income and incurred within the year in sufficient detail to show the different categories of expense,
(3) Its disbursements made within the year out of current or accumulated income for the purpose for which it is exempt, separately listing the total amount of disbursements for each classification of the exempt purposes of the organization,
(4) Its accumulation of income within the year,
(5) Its aggregate accumulation of income at the beginning of the year,
(6) (i) Its disbursements made out of principal during the current year for the exempt purpose for which it is exempt,

separately listing the total amount of disbursements for each classification of the exempt purposes of the organization,

(ii) Its disbursements made out of principal during prior years for the purposes for which it is exempt,

(7) The total of its administrative and operating expenses disbursed out of both principal and income,

(8) A balance sheet showing its assets, liabilities and net worth as of the beginning of the year. (Emphasis added).

§ 29.153-2 INFORMATION REQUIRED OF TRUSTS CLAIMING CHARITABLE OR OTHER DEDUCTIONS UNDER SECTION 162(a). [provisions implementing the reporting requirements of section 153(b) regarding the reporting of income investment accumulations by certain trusts]

The implementing regulations went on to provide for the publicity of that portion of the information reported annually by section 101(6) organizations and certain exempt trusts having to do with the accumulated investment income of such organizations, which was required to be reported and made public on an annual basis under section 153 of the 1939 Code:

> The information furnished on pages 3 and 4 of Form 990-A ... shall be a matter of public record, and shall be open to public inspection, during the regular hours of business, in the office of the collector for the district in which the forms are filed.

26 C.F.R. § 29.153-3 (Apr. 21, 1951).

Thus, the regulation expressly authorized the Commissioner to require the reporting on pages 3 and 4 of Form 990-A, in such detail as the Commissioner might choose to specify in the instructions on or accompanying that Form, of information implementing the bare statutory reporting requirements mandated by Congress in section 153(a) of the 1939 Code, with the clear understanding that all information set forth on pages 3 and 4 "shall be a matter of public record." 26 C.F.R. § 29.153-3 (Apr. 21, 1951).

However, the enabling statute did not expressly authorize the Commissioner to prescribe reporting requirements in forms or instructions thereto. Rather, Code section 153 required affected organizations to furnish information as prescribed by the Secretary in regulations. The implementing regulations, in turn, authorized the Commissioner to prescribe reporting requirements by forms or instructions thereto.

Clearly, the foregoing regulation was broadly written, in the interest, no doubt, of giving teeth to Congress' "series of amendments designed to correct certain problems which ha[d] arisen in connection with tax exempt organizations" as the 1950 reform measures were described by the House Ways and Means Committee. See H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950), reprinted in Internal Revenue Acts of the United States 1909-1950 (Vol. 116), supra.

The broad language of the regulation also is reflective of the expansive view that had been taken, historically, of the Commissioner's authority to establish, by form, in instructions thereto, or by regulation, information reporting requirements for tax administration purposes. Moreover, it is consistent with the broad scope of the authority actually exercised by the Commissioner in prescribing information reporting requirements, by forms, in instructions thereto, and by regulations, both before and after the enactment of section 54(f) of the 1939 Code which mandated, by statute, the filing of annual returns reporting such information as the Commissioner "may by regulations prescribe."

Accordingly, when Congress undertook its comprehensive revision of the internal revenue laws in 1954 it did so with the knowledge that, historically, the Commissioner in his discretion had established, by form or regulation, the detail required of exempt organizations in complying with statutory reporting obligations mandated by Congress, and also, that the Commissioner in his discretion had prescribed, by form or regulation, the reporting of such other information as he considered necessary to the administration of the internal revenue laws as they related to tax exempt organizations.

Congress described its 1954 efforts to overhaul the tax Code provisions specifically relating to procedure and administration, as follows:

> The changes represent a substantial simplification of existing provisions. Administrative provisions presently scattered throughout the code have been brought together into a new subtitle. As a result of this reorganization it has been possible to combine a great number of provisions, shortening them and providing more uniform application of the various internal revenue taxes.

S. Rep. No. 1622, 83rd Cong., 2d Sess. 133 (1954), reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954 with Legislative Histories, Laws, and Administrative Documents (Vol. 2) (B. Reams Jr., ed., William S. Hein & Co., 1982).

In summary, as a result of Congress' 1954 tax Code revisions, subsection 54(f) of the 1939 Code (requiring that certain exempt organizations file annual returns) became section 6033(a) of the 1954 Code, currently section 6033(a) of the 1986 Code, as amended; section 153(a) of the 1939 Code (mandating the reporting of specific items of information annually by organizations exempt from taxation under section 501(c)(3), formerly section 101(6)) became section 6033(b) of the 1954 Code, currently section 6033(b) of the 1986 Code, as amended; and section 153(c) of the 1939 Code (providing for public inspection of certain information required to be furnished annually by section 501(c)(3) organizations) became section 6104 of the 1954 Code, currently section 6104(b) of the 1986 Code, as amended.

According to Congress, none of these provisions was substantively amended as a result of the 1954 reorganization. The Report of the Senate Finance Committee observed, for example, that section 6033 contained "several minor technical changes," dealing with returns by exempt organizations. S. Rep. No. 1622, 83rd Cong., 2d Sess. 565 (1954), reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954 (Vol. 2), supra.

One of the minor technical changes made to section 6033, was to reword the text of sections 6033(a) and (b) to provide, specifically, that the information required to be reported annually by exempt organizations pursuant to these provisions, may be prescribed "by forms or regulations." Pub. L. No. 591, § 6033(a) and (b), 83rd Cong., 2d Sess. (1954), codified as 26 U.S.C. § 6033(a) and (b) (1954), I.R.C. § 6033(a) and (b) (1954), reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954 (Vol. 11), supra, (emphasis added). By contrast, the wording of section 54(f) of the 1939 Code merely had recognized that the Commissioner was authorized to prescribe "by regulation" the information to be reported annually by affected exempt organizations.

Thus, consistent with Congress' declared intention of "attempt[ing] to express the internal revenue laws in a more understandable manner," in 1954, Congress gave statutory recognition to the broad authority reposed in the Commissioner to specify by form, as well as by regulation, information

required for tax administration purposes, which authority the Commissioner had exercised, historically, but which had been formally recognized and articulated, previously, only in the regulations and in the forms and associated instructions actually prescribed from time to time, by the Commissioner. See H.R. Rep. No. 1337, 83rd Cong., 2d Sess. 1 (1954) reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954 (Vol. 1), supra.

Section 6104 of the 1954 Code (formerly section 153(c) of the 1939 Code), contained no material change from existing law. It thus provided for the publicity of the information furnished annually by section 501(c)(3) organizations, as required by section 6033(b) and such implementing forms or regulations as the Commissioner might prescribe.

Thus, in 1954, section 6104 read as follows:

> The information required to be furnished by sections 6033(b) and section 6034, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary or his delegate may prescribe.

Pub. L. No. 591, 83rd Cong., 2d Sess. (1954), reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954, 755 (Vol. 11), supra.

Since 1954, Congress has progressively expanded the scope of section 6104, not simply to facilitate tax administration and compliance with respect to exempt organizations as a general matter, but also specifically for the purpose of expanding the public's role in overseeing the activities and operations of tax-exempt organizations.

For example, in 1958, I.R.C. § 6104 (a)(1)(A) was added to the disclosure laws for the specific purpose of assisting the IRS in its oversight of organizations that were granted federal tax exempt status under I.R.C. §§ 501(c) and (d). See Technical Amendments Act of 1958, § 75, Pub. L. No. 866, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 308. Congress took this action because it believed that if the applications and associated supporting papers of organizations that qualified for tax exemption were available to the public, the IRS would be substantially aided in its efforts to determine whether such organizations actually were operating in the manner stated in their applications and consistent with their continuing to enjoy the benefits of federal tax exempt status. See S. Rep. No. 1983, 85th Cong., 2d Sess. 95 (1958), 1958-3 C.B. 1017, and H.R. Rep. No. 775, 85th Cong., 1st Sess. 41-42 (1958), 1958-3 C.B. 851-52 (confirming the broad pro-disclosure policy embodied in subsection 6104, generally, and indicating that Congress considered public inspection to be the price that must be paid to obtain tax exemption, and that it is an adjunct to enforcement, offering an added guarantee that exempt organizations will operate consistent their grant of exempt status); see also Rev. Rul. 59-267, 1959-2 C.B. 382-83.

Subsequently, the Tax Reform Act of 1969 amended section 6104 to mandate broad public access to the annual returns of all reporting exempt organizations and to require disclosure of such returns to state officials. See Pub. L. No. 172, § 101(e), 91st Cong., 1st Sess. (1969), 1969-3 C.B. 27-29, I.R.C. § 6104(b) and (c) (1954) (currently, I.R.C. § 6104(b) and (c) (1986), as amended). In taking this measure, Congress expressly excepted from public disclosure, information reported on the annual returns of exempt organizations that identified contributors to public charities. Congress explained that it regarded this limited exception to the publicity requirements of section 6104 as warranted in the interest of protecting the privacy of the substantial number of contributors who apparently prefer to

donate anonymously. See S. Rep. No. 552, 91st Cong. 1st Sess. (1969), 1969-3 C.B. 458-459.

Thus, to the extent that Congress perceived a legitimate reason for excepting certain return information from the publicity requirements of section 6104, it has protected such information from disclosure, expressly, by statute. See H.R. Conf. Rep. No. 782, 91st Cong. 1st Sess. (1969), 1969-3 C.B. 649-650. Congress has not seen fit to exclude from the reach of section 6104 information reported on annual returns regarding highly compensated employees and contractors, or information relating to unrelated business activities. Id.

To the extent that Congress has addressed either category of information it has been to facilitate and encourage, rather than limit, disclosure. For example, the Tax Reform Act of 1969 amended section 6033(b) to specifically require section 501(c)(3) organizations to report such information, annually, as the Commissioner may prescribe by form or regulation (which information would be publicly available under section 6104(b)) regarding the names, addresses and annual payments to highly compensated employees. See Pub. L. No. 172, § 101(d)(2) and (j)(30), 91st Cong. 1st Sess. (1969), 1969-3 C.B. 27, 33, I.R.C. § 6033(b)(6) and (7) (1954) (currently, I.R.C. § 6104(b) and (c) (1986), as amended). See also H.R. Conf. Rep. No. 782, 91st Cong. 1st Sess. (1969), 1969-3 C.B. 649-650.

Likewise, Congress has consistently reiterated the view that more, not less, public information regarding the unrelated business activities of exempt organizations is essential for efficient administration of the tax laws as applied to such organizations. The Omnibus Budget Reconciliation Act of 1987 (OBRA 1987), § 10703(a), Pub. L. No. 203, 100th Cong., 1st Sess. (1987), 1987-3 C.B. 179-180, expanded the information reporting requirements of section 501(c)(3) organizations, specifically, to capture additional information about the unrelated business activities of such organizations, which information would be available to the public under section 6104.

AS further discussed, infra, OBRA 1987 added the provisions of section 6033(b)(9) to the Code, requiring that section 501(c)(3) organizations report such information concerning direct or indirect transactions involving or relationships between the reporting organization and non-section 501(c)(3) organizations, including lobbying groups and section 527 political organizations:

> as the Secretary may require to prevent--
>
> (A) diversion of funds from the organization's exempt purpose, or
> (B) misallocation of revenue or expense ....

I.R.C. § 6033(b)(9); see also pp.38, 40, infra, and n.7, supra.

As a result of the enactment of section 6033(b)(9), Form 990 and Form 990-PF were revised to require more information about the income-producing activities of organizations filing these returns. See Announcement 89-34, 1989-10 I.R.B. 30 alerting the tax exempt community of proposed changes to Forms 990 and 990-PF and noting that "[t]he Oversight Subcommittee of the House Ways and Means Committee has expressed a need for this information in correspondence with the Service and in the course of its hearings dealing with unrelated business income tax provisions of the [Code]." Id.

As a related matter, in 1987, Congress revisited the topic of public disclosure as a tax administration and compliance tool in the context of

organizations enjoying the privilege of tax exemption. As a result, Congress broadened the publicity requirements mandated by section 6104.

Congress noted that under section 6104, the annual information returns of exempt organizations (with the sole exception of information identifying contributors to public charities) were "disclosable to the public through requests to the IRS," that "private foundations must make current annual returns available for public inspection at their principal office," and that the "exemption application filed by a tax-exempt organization, and the IRS determination of its exempt status, are disclosable to the public through requests to the IRS." H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1015 (1987), 1987-3 C.B. 295.

Nevertheless, Congress believed that the foregoing disclosure requirements were insufficient, and enacted legislation to facilitate greater public access to IRS approved exemption applications and the annual returns of tax-exempt organizations, at the same time as it expanded the information that section 501(c)(3) organizations were required to disclose on their annual returns, by enacting section 6033(b)(9) and (10), as discussed more fully at pp.38-39 & n.15, infra.

Thus, OBRA 1987, § 10702(a), Pub. L. No. 203, 100th Cong., 1st Sess. (1987), 1987-3 C.B. 179-180, added subsection (e) to section 6104 mandating that tax-exempt organizations

> make available for public inspection, generally at the organization's principal office, a copy of its three most recent annual returns. .... The returns also must be available for inspection at certain regional or district offices of the organization. ....

See H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. (1987), 1987-3 C.B. 295.

Thus, in light of the long history of section 6104 which was created as a tax exempt organizations compliance tool in 1950 and has been progressively expanded for that same purpose over the past 45 years, we are of the view that so long as information that exempt organizations are required to report on Form 990 is information that the Commissioner is authorized to obtain under section 6033, such information is information that must be made available to the public to the extent mandated by Congress under the provisions of section 6104.

In this regard, we particularly note that the legislative history of the Revenue Act of 1950 clearly indicates that the enactment of the UBIT (and the creation of its associated Form 990-T, as noted at p.17, supra), and the enactment of the section 153 reporting and disclosure requirements (and the creation of a new, partially public, Form 990-A annual return), were two related components in Congress' coordinated response to income-generating entrepreneurial activities engaged in by tax exempt organizations that were unrelated to their exempt purposes. Congress' ambitious goal was to identify such operations and, in the case of unrelated business activities, to tax the profits, and in the case of excessive accumulations of investment income, to diminish the practice by exposing it to the public, or alternatively, to put an end to the tax privileged status of the offending involved.

Obviously, in addition to taxing the unrelated business profits of exempt organizations after 1950 (or as an alternative to so doing), Congress could have mandated minimum reporting and disclosure requirements for the purpose of publicizing such activities and to guarantee a minimum level of monitoring of such activities, similar to the approach taken with respect to

the problem of excess investment accumulations. Instead, Congress chose only to tax the income of such activities (on the same basis as if it had been generated in a for-profit context), and left entirely to the Commissioner's discretion the matter of monitoring such activities through annual information reporting requirements to be prescribed from time to time in light of administrative experience and the IRS' own perceived needs for purposes of administering the tax laws pertaining to exempt organizations.

Subsequently, of course (for example in 1969 and 1987), Congress did see fit to legislate certain minimum public reporting and disclosure requirements with respect to the unrelated business activities of certain exempt organizations, thereby mandatorily supplementing the requirements prescribed by the Commissioner in the exercise of his discretion under section 6033. See pp.25-27, supra, and pp.38, 40-41, infra.[8]

Such, in our view, is the underpinning of the authority reposed in the Commissioner. Moreover, it is clear that while the Commissioner's authority to prescribe, by form or regulation, the information to be reported by exempt organizations on their annual returns has not diminished since the early 1950's, the scope of reporting and disclosure statutes applicable to exempt organizations has been considerably expanded by Congress, since that time.

The fact that in the past the Commissioner (in the exercise of his discretion under section 6033 to require the reporting of information necessary for the administration of the tax laws relating to exempt organizations) apparently saw little need for annual reporting of UBIT information by exempt organizations engaged in such operations, does not preclude the Commissioner from requiring the reporting of such information in light of current circumstances. Past practice, whereby the Commissioner may have exercised his discretionary authority more narrowly, does not undercut or circumscribe the scope of that authority or impair the ability of the Commissioner to exercise such authority more broadly to ensure that exempt organizations currently are organized and operated in accordance with the requirements of tax exempt status and to otherwise administer the tax laws pertaining to such organizations.

In sum, as will be discussed in Section 2, infra, the Commissioner has the authority under section 6033, to require more detailed information reporting than in fact has been prescribed in the past. The fact that the Commissioner's discretionary authority was exercised narrowly or conservatively at one time does not, in principle or as a practical matter, preclude a broader and more aggressive exercise of that authority as the interests of efficient administration of the tax laws pertaining to exempt organizations change.

Section 6104 plainly requires public disclosure of the information required to be reported by exempt organizations pursuant to section 6033, except as expressly protected from disclosure by Congress, under section § 6104(b) and (e).

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[8] In this regard, we note that the Task Force Report quotes the Subcommittee on Oversight of the House ways and Means Committee, as being of the view that:

> [T]he IRS has not fully used its authority to determine what information should be on the annual information return to ensure that the return is of maximum utility to all of its users ....

Task Force Report, Executive Summary at 1.

Moreover, Congress consistently has reiterated the need for greater reporting by exempt organizations of information regarding their ongoing activities (both so-called "related purpose" activities and unrelated business activities), under section 6033. With narrow exceptions (e.g., information identifying public charity donors) Congress has not seen fit to exempt information furnished pursuant to section 6033 from the publicity requirements of section 6104.

The result is a two-fold reporting and disclosure scheme for purposes of administering the tax laws as they relate to exempt organizations. Information reported on Form 990-T for purposes of administering the laws governing the taxation of the net proceeds of the unrelated business operations of exempt organizations is subject to the protections of section 6103. However, the same or similar information, when it is reported on Form 990, in compliance with the requirements of section 6033 and implementing forms or regulations prescribed by the Commissioner, is subject to the disclosure provisions of section 6104.

2. I.R.C. § 6033

The language of I.R.C. § 6033(a) is little changed today from the language of the provision as originally enacted in 1943 as subsection 54(f) of the 1939 Code.

As originally enacted the reporting requirement read, in pertinent part, as follows:

> (f) Every organization, except as hereinafter provided, exempt from taxation under section 101 shall file an annual return which shall contain or be verified by a written declaration that it is made under the penalties of perjury, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. (Emphasis added).

By comparison, section 6033(a) as currently enacted provides, in pertinent part, as follows:

> (1) IN GENERAL.--Except as provided in paragraph (2), every organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Commissioner by forms or regulations may prescribe .... (Emphasis added).

The material difference between the language of the two provisions is that section 6033 recognizes the Commissioner's authority to prescribe the annual reporting requirements of exempt organizations, by form, as well as by regulation, whereas subsection 54(f) of the 1939 Code, did not.

However, as a practical matter the Commissioner did prescribe such reporting requirements, by form or by regulation, in the exercise of his discretion, both before and after the enactment of subsection 54(f). Thus, the insertion of words recognizing the Commissioner's authority to prescribe

requirements "by form," into the 1954 Code, merely gave formal recognition to a longstanding and unquestioned practice. In fact, Congress described this alteration in language as a "minor technical change[]," rather than as a substantive broadening or extension of the Commissioner's authority, under prior law, to obtain information necessary, in his discretion, for the efficient administration of the revenue laws relating to exempt organizations. S. Rep. No. 1622, 83rd Cong., 2d Sess. 565 (1954), reprinted in Internal Revenue Acts of the United States: The Revenue Act of 1954 (Vol. 11), supra.

In light of the history of the Commissioner's authority to prescribe, by form, information required for purposes of administering the tax laws as they relate to exempt organizations (both before and after the passage of legislation in 1954 expressly recognizing such authority), we are of the view that the additional information sought on the proposed redesigned Form 990, for reasonable, articulable, purposes related to the administration of the internal revenue laws as they pertain to tax exempt organizations, is information that the Commissioner is authorized to prescribe, by form or by regulation, under section 6033(a). That being the case, such information will become publicly available to the extent mandated by section 6104(b) and (e).

Our conclusion in this regard is consistent with and supported by Counsel's own prior opinions examining the scope of the Commissioner's broad discretionary authority to take action (with respect to prescribing forms and otherwise) to ensure the efficient administration of the internal revenue laws as applied to tax exempt organizations.

Thus, section 6033 expressly recognizes the Commissioner's authority, with certain exceptions, to require organizations exempt from tax under section 501(a) to file annual returns, stating specifically their items of gross income, receipts, disbursements, and such other information for the purpose of carrying out the internal revenue laws relating to such organizations as the Commissioner by forms or regulations may prescribe.

Section 6001 provides that every person liable for tax or the collection thereof shall keep such records, render such statements, make such returns, and comply with such rules and regulations as may be prescribed.

Section 6011(a) provides that, when required by regulations, any person made liable for any tax, or the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Commissioner. Every person required to make a return shall include therein the information required by such forms or regulations.

Section 7805(a) provides that the Commissioner shall prescribe all needful rules and regulations for the enforcement of the provisions of Title 26, including all rules and regulations as may be necessary by reason of any alteration of the law in relation to internal revenue.

The scope and application of the foregoing provisions was examined in Form 990, Information Returns, G.C.M. 38895, EE-117-81 (Aug. 4, 1982), in the context of an issue analogous to those presented here.[9] In our view, the reasoning and analysis applied in that case, also is applicable here.

The issue presented in Form 990, Information Returns, G.C.M. 38895, was whether the Commissioner of Internal Revenue could require exempt organizations to report cash contributions separately from the value of donated services and the free use of facilities on Form 990.[9] In light of

[9] The background to G.C.M. 38895 was that representatives from exempt organizations and the accounting profession wished to aggregate the value of donated services and the free use of facilities with actual cash contributions

Congress' broad grant of authority to the Commissioner, under section 6033(a), to prescribe the manner in which tax returns are to be made, it was concluded

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and cash expenses. The reliance that many states place on Form 990 information to monitor the financial activities of charities apparently provided an incentive for this practice.

> Apparently, many state charitable solicitation acts contain percentage limitations on fund raising costs. Generally, these laws create a ratio by using total contributions as the denominator. By preventing the exempt organizations from including donated services and the free use of facilities in the total contributions support amount, it is believed that such amount will be understated and amounts allowed to be spent on fund raising will be unfairly limited.
>
> [By contrast, the IRS takes the position] that the fungible reporting of actual cash items and the value of donated services and the free use of facilities is not authorized by the [Code and] that such a practice would distort financial statements and present a potential for abuse.

Form 990, Information Returns, G.C.M. 38895 at 1-2.

that the Commissioner could require cash contributions and expenses to be reported separately from the value of donated services and the free use of facilities on Form 990 to ensure the receipt of accurate and consistent data. Form 990, Information Returns, G.C.M. 38895, at 1.[10]

Although Form 990, Information Returns, G.C.M. 38895, states that it addressed a case of first impression under section 6033,[11] it notes that the IRS and the courts had "considered similar authority under sections 6001 and 6011(a)" and treated such precedent as applicable to section 6033, notwithstanding, that sections 6001 and 6011 relate to returns that, unlike Forms 990, generally are protected from public disclosure under section 6103.

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[10] I.R.C. § Section 6033(a) actually grants the authority designated therein to the "Secretary," a term that is defined in I.R.C. § 7701(a)(11)(B) to mean "the Secretary of the Treasury or his delegate." Since Treasury Department Orders (TDOs) 150-37 (1955) and 150-10 (1982) delegated authority from the Secretary of the Treasury to the Commissioner of Internal Revenue to administer and enforce the Internal Revenue laws, the broad grant of authority contained in section 6033(a) is reposed, by delegation, in the Commissioner or the Commissioner's own delegate.

[11] In so stating, G.C.M. 38895, recognized that the Commissioner's discretionary authority under section 6033(a) to exempt certain organizations from the reporting requirements of section 6033 had been considered in Form 990-PF, Distributions to Indigent or Needy Persons, G.C.M. 38835, EE-127-81 (Jan. 18, 1982) and in Application of the Commissioner's Discretionary Authority, G.C.M. 37034, I-100-75 (Mar. 8, 1977). G.C.M. 38895 at n.1. See also pp.41-42, infra.

G.C.M. 38895 at 2. We concur with the view expressed in G.C.M. 38895 that such precedent is applicable in defining the scope of the Commissioner's authority under section 6033.

Proper Treatment of IRA Deductions and Taxes for Return Purposes, G.C.M. 36091, I-531-74 (Dec. 3, 1974), for example, states that the Code grants the Commissioner broad authority to devise whatever returns or statements the IRS needs from taxpayers in order to administer the tax laws. Accordingly, Proper Treatment of IRA Deductions and Taxes for Return Purposes, G.C.M. 36091, found that Code sections 6001 and 6011 granted the Commissioner authority to require a taxpayer who established an IRA to attach a schedule to Form 1040 that would, among other things, serve as an information return under section 6058.

Likewise, Receipt of Tax Data in Machine Useable Form, G.C.M. 33879, I-3149 (Aug. 8, 1968), states that sections 6001 and 6011 provide the Commissioner with complete control over the matter of making returns.

In citing this precedent, Form 990, Information Returns, G.C.M. 38895 at 3, states:

> [w]e believe that Congress intended to grant the same authority to the Commissioner when it enacted section 6033(a). Thus, we perceive no legal barrier to requiring organizations exempt from tax under section 501(a) to report the value of donated services and the free use of facilities separately from actual cash items on Form 990.

Moreover, Form 990, Information Returns, G.C.M. 38895 expressly recognizes that Congress had not only given the Commissioner broad discretion to prescribe the format and design of returns "for the purpose of getting tax information in some form, but also to get it with such uniformity, completeness and arrangement that the physical task of handling and verifying returns may be accomplished." Id. at 3-4 citing Commissioner v. Lane-Wells Co., 321 U.S. 219, 223 (1944).

The function of a return form, as a general matter, was examined in Signing of Returns Prepared Under Authority of Section 6020(b)(1), G.C.M. 34673, I-3979 (Nov. 9, 1971) which states:

> The function of the return form is to facilitate the efficient administration of the tax laws. It was for that purpose that Congress gave the Service broad statutory authority to require of the taxpayer the information needed to verify his tax liability, and to set the form in which he must supply the information. Under this authority, the Service promulgated precise regulatory requirements, and has prepared and makes available detailed instructions designed to enable taxpayers to comply with those requirements, as well as the forms that must be used.

In light of this explanation, the IRA "schedule" at issue in G.C.M. 36091 was found to be "consistent with the intended function of a return." Proper Treatment of IRA Deductions and Taxes for Return Purposes, G.C.M. 36091 at 5. G.C.M. 36091 also states that the substance of a document devised by the IRS (rather than, for example, its label), is the "controlling factor" in determining whether that document constitutes a "return" that is subject to the Commissioner's broad authority with respect to returns, under the Code. Id.

However, Form 990, Information Returns, G.C.M. 38895, cautioned that rules and regulations promulgated by the Commissioner under section 6033, "must implement the Congressional mandate in some reasonable manner" and that

such authority must be exercised "with discretion within the apparent purpose and intent of Congress and the reasonable understanding and expectation of the taxpayer." G.C.M. 38895 at 3 citing United States v. Correll, 389 U.S. 299 (1967), and quoting Proper Treatment of IRA Deductions and Taxes for Return Purposes, G.C.M. 36091, I-531-74 at 4 (Dec. 3, 1974) ("[t]he Code clearly contemplates that the Service has broad authority to devise whatever returns or statements it needs from taxpayers in order to administer tax laws, subject of course to the mandate that the authority must be exercised with discretion within the apparent purpose and intent of Congress and the reasonable understanding and expectation of taxpayers.") (Emphasis added).

Specifically, in reference to reasonable requirements and the intent and purpose of Congress, Form 990, Information Returns, G.C.M. 38895 at 4, noted that, by virtue of the Tax Reform Act of 1969, Congress had substantially amended the "reporting, disclosure, and publicity requirements" applicable to tax exempt organizations.

> The present information return requirements are essentially the same as those as those provided by the 1950 amendments to the charitable organization provisions of the Code. The primary purpose of these requirements is to provide the [IRS] with information needed to enforce the tax laws. The House and the Finance Committee concluded that experience of the past two decades indicates that more information is needed, on a more current basis for more organizations and that this information should be made more readily available to the public, including State officials.

Incomplete Returns, G.C.M. 36506, I-212-75 at 4 (Dec. 8, 1975), quoting S. Rep. No. 552, 91st Cong., 1st Sess. 52 (1969), 1969-3 C.B. 457. See also Form 990, Information Returns, G.C.M. 38895 at 4.[12]

As explained in Form 990, Information Returns, G.C.M. 38895:

> To accomplish these goals of information collection and dissemination, Congress among other things, amended section 6033 (relating to exempt organization information returns) to apply to additional classes of organizations and to require the filing of additional information. Section 6056 was added to the Code requiring private foundation managers to file an annual report in addition to the return required under section 6033. Section 6104 (relating to the publicity of information required from certain exempt organizations) was amended to require disclosure of information to state officials and public inspection of exempt

[12] In the same vain, the Executive Summary of the Form 990 Redesign Task Force Report at 1, opens with the following quote from the Subcommittee on Oversight of the House Ways and Means Committee:

> The Subcommittee finds that the current reporting requirements on Form 990 do not provide donors, the public, or IRS with sufficient information to properly evaluate the operations of exempt organizations. The Subcommittee believes that the IRS has not fully used its authority to determine what information should be on the annual information return to ensure that the return is of maximum utility to all of its users...."

Task Force Report at 1 (emphasis added).

organization returns and private foundation annual reports. Id. at n.2.[13]

In addition, Congress felt that the threat of sanctions was necessary to ensure the collection and coordination of information that the Commissioner deemed necessary for the proper administration of the revenue laws applicable to exempt organizations. To this end, it enacted section 6652(d)(1), providing as follows:

> In the case of a failure to file a return required under section 6033 (relating to returns by exempt organizations) ... on the date and in the manner prescribed therefor ... unless it is shown that such failure is due to reasonable cause there shall be paid (on notice and demand by the Secretary ... and in the same manner as tax) by the exempt organization ... failing so to file, $10 for each day during which such failure continues, but the total amount imposed hereunder on any organization for failure to file any return shall not exceed $5,000.

Moreover, it has been observed previously that "it is evident that behind the enactment of [section] 6652(d) was the desire not only to secure timely information returns, but complete ones as well" since the purpose of such returns is to "provide information necessary for the [IRS] to properly administer the revenue laws." Incomplete Returns, G.C.M. 36506, I-212-75 at 6 (Dec. 8, 1975). See also Statute of Limitations and Incomplete Returns, G.C.M. 39861, TR-45-1249-90 at 5 (Sept. 26, 1991) (noting that "[t]he considerations underlying the need for timely and complete filings of required information and the justification of a penalty for failure to provide such information are discussed at length in Incomplete Returns, G.C.M. 36506 ....")

Incomplete Returns, G.C.M. 36506 identified specific line items as being crucial to the completeness of returns required to be filed under section 6033(a)(1) and the regulations thereunder, and provided as follows:

> [I]f any of the [enumerated] items of information are omitted from an exempt organization's return, this would constitute the omission of material information that is necessary for the Service to properly administer the revenue laws in that it would hinder or prevent the Service from being able to perform the duties and responsibilities placed upon it by Congress. Therefore, the failure to provide such information should be treated as [a

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[13] The Act of December 28, 1980, Pub. L. No. 96-603, §1(a), 94 Stat. 3508 (1980), subsequently simplified the reporting requirements of private foundations by, inter alia, repealing section 6056 and amending section 6033 to include all the reporting requirements for private foundations. See I.R.C. § 6033(c).

"failure to file a return" for purposes of section 6652(d)]. However, it is recognized that in the fair and impartial administration of the tax laws, the Service will, based on the facts of each particular case, find that certain omissions have resulted from reasonable cause.

It should be pointed out that if the materiality of these items is questioned by a taxpayer or subsequently made the subject of litigation, the Service should be prepared to substantiate why it considers such items to be material. The reason for the materiality of these items is, of course, an administrative matter and not a legal one.

G.C.M. 36506 at 8, 9 and 11 (emphasis added). See also Rev. Rul. 77-162, 1977-1 C.B. 400 (an exempt organization that, without reasonable cause, omits material information from Form 990, has failed to file a return for purposes of the penalty imposed by section 6652(d)(1)).[14]

Thus, under section 6033(a)(1), subject to the exceptions described in section 6033(a)(2), Congress has granted the Commissioner broad authority to require all exempt organizations to report information which, in the Commissioner's determination, is material for the administration of the revenue laws relating to such organizations.

In addition, Congress has mandated certain minimum reporting requirements for section 501(c)(3) organizations that are set forth in section 6033(b). Pursuant to section 6033(b), the information that the Commissioner requires reporting section 501(c)(3) organizations to furnish, annually, shall include information with respect to each of the items specifically identified by Congress in section 6033(b)(1) through (9). See also pp.14-17, 27, & n.7, supra.

In addition, Section 6033(b)(10), which was enacted along with section 6033(b)(9) by section 10703(a) of OBRA 1987, expressly confirms that the Commissioner is authorized to require section 501(c)(3) organizations to report information that is outside the scope of section 6033(b)(1) through (9), provided such additional information reasonably is required by the Commissioner "for purposes of carrying out the internal revenue laws." I.R.C. § 6033(b)(10).[15]

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[14] Section 6652(d) was redesignated as section 6652(c) and amended by section 10704 of OBRA 1987. The scope and application of the penalty provision before and after amendment was examined in Statute of Limitations and Incomplete Returns, G.C.M. 39861, TR-45-1249-90 (Sept. 26, 1991), which affirmed that Rev. Rul. 77-162 and G.C.M. 36506 "are still correct and applicable to situations addressed by section 6652(c)(1)(A)(i) concerning a failure to file a return," id. at 6, and noted that the 1987 amendment "expands the scope of the penalty provisions to apply to cases where a tax exempt organization files an annual information return but, without reasonable cause fails to furnish on the return any required information, or furnished incorrect information." Id. at 4 quoting H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1016-1017 (1987), 1987-3 C.B. 296-297.

[15] In pertinent part, section 6033(b)(10), provides as follows:

> Every organization described in section 501(c)(3) which is subject to the [annual reporting] requirements of [section 6033(a)] shall furnish annually information, at such time and in such manner as the [Commissioner] may by forms or regulations

prescribe, setting forth--

[the information required by section (b)(1) through (9)] and,
(10) such other information for purposes of carrying out the internal revenue laws as the [Commissioner] may require.

Accordingly, in light of the Commissioner's expansive authority under section 6033(a), the Commissioner may alter the reporting requirements for exempt organizations, periodically, to reflect refinements in the IRS' view of information (or the form of such information) that is material to the administration of the tax laws.

Thus, for example, in 1982, the Form 990 reporting requirements were amended in an exercise of the Commissioner's discretion under section 6033(a), in order to implement the IRS' determination that the value of donated services and the free use of facilities was material information that exempt organizations should be required to report separately from actual cash items, on their annual Form 990. See Form 990, Information Returns, G.C.M. 38895, EE-117-81 (Aug. 4, 1982).

Similarly, Announcement 89-34 notified the exempt organizations community that "[p]rimarily to offset the aggregate reporting burden increase" caused by new reporting requirements for Form 990 and Form 990-PF filers, the IRS "intends to adopt a shortened (two page) version of Form 990 for 1989 and later years ... tentatively numbered Form 990EZ ... to be filed by organizations with [limited gross receipts and assets, that] will not have to provide the detailed information about income-producing activities required by new [Forms 990 and 990-PF]." Id. at 31 (emphasis in original).

Clearly, the IRS' decision to create this entirely new exempt organizations information reporting return was authorized as an exercise of the Commissioner's discretion under section 6033(a). Equally, in our view the Commissioner, in her discretion, could dispense with Form 990EZ or redesign it, so long as the result reasonably could be justified as necessary for tax administration purposes under section 6033(a).

In addition, the Commissioner may prescribe new or different reporting requirements to accommodate specific mandates from Congress that are designed to improve compliance, or to counter potential abuse of the revenue laws, by exempt organizations.

For example, as noted above, OBRA 1987 made changes to the information that must be disclosed by section 501(c)(3) organizations on their annual information returns. Specifically, OBRA 1987 added the provisions of section 6033(b)(9) to the Code, requiring section 501(c)(3) organizations to report such information concerning direct or indirect transactions involving or relationships between the reporting organization and non-section 501(c)(3) organizations, as the Secretary may require in order to prevent diversion of funds from tax exempt purposes, or misallocation of exempt organization revenue or expenses.

Pursuant to section 6033(b) and/or section 6033(a), the Commissioner was expressly authorized to prescribe reporting requirements implementing this new Congressional mandate, by forms or by regulation. The Commissioner opted to prescribe expanded reporting requirements implementing section 6033(b)(9), by form.

Thus, as a result of the enactment of section 6033(b)(9), Form 990 and Form 990-PF were revised to require more information about the income-producing activities of organizations filing these returns. See Announcement 89-34, 1989-10 I.R.B. 30 alerting the tax exempt community of proposed changes to Forms 990 and 990-PF and advising them that the additional information elicited on the revised forms "would serve the twofold purpose of providing Congress with data needed to assess the impact of each current (or future) Code provision which shields certain types of income from the unrelated business income tax, as well as improving taxpayer compliance with, and the

Service's administration of, the current unrelated business income provisions." Id. at 30-31.[16]

In our view, the unrelated business income information that would be elicited on Parts II and III of the redesigned Form 990, reasonably can be said to advance the same twofold purpose identified in Announcement 89-34. Thus, the required reporting of such information reasonably implements the requirements of section 6033(b)(9) with respect to section 501(c)(3) organizations. In addition, it would appear to be justified as a reasonable exercise of the Commissioner's broad discretion under section 6033(a)(1) with respect to all reporting exempt organizations.

Likewise, the required reporting of specific information regarding the names, addresses and compensation of an exempt organization's most highly compensated five employees and five independent contractors receiving in excess of $30,000 annually, which clearly is authorized with respect to section 501(c)(3) organizations pursuant to section 6033(b)(5),(6), and (10), is authorized with respect to all tax exempt organizations as an exercise of the Commissioner's broad discretion under section 6033(a)(1).

Of course, the Commissioner's authority under section 6033(a) is not limitless, in the sense that it must be exercised in a reasonable manner for the purpose of securing information that is material to the administration of the internal revenue laws as they relate to exempt organizations. See Incomplete Returns, G.C.M. 36506, I-212-75 at 4 (Dec. 8, 1975).

As cautioned in Incomplete Returns, G.C.M. 36506,

> [W]hile materiality is an administrative rather than a legal matter, the Service should be prepared to substantiate such claim if questioned .... In this context we also suggest that the correspondence of th[e] proposed program be carefully drafted so as to reflect the reasonableness of the Service request.

Assessment of Penalties on Incomplete Returns (Form 5500 Series Employee Plan Returns), G.C.M. 38943, EE-103-81 at 4 (Dec. 22, 1982) quoting Incomplete Returns Program, G.C.M. 37785, EE-61-78 at 8 (Dec. 12, 1978).

Prior opinions that have examined the Commissioner's discretionary authority under section 6033(a) to exempt certain organizations from the reporting requirements of section 6033 also are instructive in this regard. For example, Form 990-PF, Distributions to Indigent or Needy Persons, G.C.M. 38835, EE-127-81 at 3-4 (Jan. 18, 1982), stated that the Commissioner has no discretionary authority to alter the information, that by clear Congressional

[16] The piecemeal evolution of Form 990 (and similar exempt organization information returns) in response to prevailing administrative and Congressional concerns, is described in the Task Force's Executive Summary at 5-6.

mandate, is required to be reported by private foundations on their annual returns under section 6033(c), particularly since Congress also has mandated the public disclosure of such information under section 6104).

Likewise, Application of the Commissioner's Discretionary Authority, G.C.M. 37034, I-100-75 at 7 (Mar. 8, 1977), recognized that the discretionary authority granted under section 6033(a)(2)(B) permitted the Commissioner to raise the section 6033(a)(2)(A)(ii) gross receipts filing exception from $5,000 to $10,000. However, the opinion concluded that the facts presented did not provide a reasonable basis for the exercise of such authority because Congress intended that the Commissioner could relieve organizations from the filing requirements only where he determined that the filing is unnecessary for the efficient administration of the tax laws as they apply to tax exempt organizations. Congress did not intend that the Commissioner's discretionary authority would be used merely to lessen administrative burdens on the IRS. Id.

In sum, it is our opinion that, in principle, the Commissioner is authorized to mandate the new exempt organizations' reporting requirements contained on the redesigned Form 990, in an exercise of the Commissioner's authority under section 6033(a), provided, however, that such revised reporting requirements request information that is material for purposes of administering the tax laws as they relate to exempt organizations, taking into account the intent of Congress and the reasonable expectations of reporting organizations.

Furthermore, so long as the information that an exempt organization is required to report on Form 990 is information that the Commissioner is authorized to obtain under section 6033, it is irrelevant that such information, also is required to be reported by such organizations in a form (such as on Form 990-T) that it not subject to the public disclosure requirements mandated by Congress in section 6104(b) and (e).

In our view, this conclusion is supported by the broad authority of the Commissioner under section 6033 and is consistent, fully, with the pro-disclosure policy considerations underlying section 6104, and the fact that Congress, periodically, and deliberately, has acted to broaden the scope of public disclosure that is mandated for purposes of efficiently and effectively administering the tax laws as they relate to tax exempt organizations, pursuant to the provisions of section 6104.

3. Taxpayer Burden

Finally, with respect to the issue of the relative burden imposed upon taxpayers by different reporting requirements, we note that the Commissioner's discretion under section 6033 is not constrained by any requirement other than materiality and reasonableness. We further note that the Task Force, in its Executive Summary, states that "[t]he primary burden on tax-exempt organizations and on the IRS is to achieve compliance with the tax laws." Id. at 2.

While logically, an excessively burdensome reporting requirement would likely be unreasonable for purposes of section 6033, we nevertheless defer to your expertise on questions of taxpayer burden.

If you have any questions, please contact Lynnette Platt, the attorney assigned to this matter, at (202) 622-4570.

/s/

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